

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

IN RE:

LUIS FRANCISCO CONCEPCION CRUZ
JACKELINE DIAZ SANCHEZ

Debtors

CASE NO. 09-06219 (ESL)

CHAPTER 13

FILED & ENTERED

OCT 7 2010

U.S. BANKRUPTCY COURT
SAN JUAN, PUERTO RICO

OPINION AND ORDER

This case is before the court upon the Chapter 13 Trustee's motion objecting the confirmation of Debtors' Chapter 13 plan based upon the allegedly excessive educational expenses for Debtors' two (2) children (Docket No. 28). Debtors filed their reply to the Chapter 13 Trustee's objection to their plan confirmation (Docket No. 37) arguing that; (i) the auxiliary benefits both children receive under the Social Security Act are excluded from disposable income pursuant to 11 U.S.C. §101(10A)(B) and thus, Debtors may use these auxiliary benefits exclusively for the education of their children; (ii) the educational expenses incurred for Debtors' two (2) children are reasonable given the inadequacy of the Puerto Rico public school system. For the reasons stated herein the court denies the Chapter 13 Trustee's objection to Debtors' plan confirmation and orders Debtors to submit evidence regarding the \$200.00 of the prorated monthly expense for school books, materials, uniforms listed as part of line item #17- Other on Schedule J-Current Expenditures Of Individual Debtor(s) and evidence of the annual school tuition expense for both children.

Background

Debtors filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code on July 30, 2009. Debtors filed their Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income-Official Form 22C ("Form 22C"). The Debtors' household consists of four (4) persons, and Debtors have a household income that is above the median for a household of four (4) persons in the Commonwealth of Puerto Rico. Debtors' Form 22C indicated that Debtors have a current monthly income of \$3,284.74 (line item #20 of Form 22C) and annualized income of \$39,416.88 (line item #21 of Form 22C). Debtors' monthly disposable income

1 according to Form 22C results in a deficit of (\$2,188.71)(line item 59 of Form 22C), given that the
2 total deductions allowed under 11 U.S.C. §707(b)(2) of the Bankruptcy Code as indicated in Form
3 22C amount to \$5,473.45 (line item 58 of Form 22C). Debtors' Schedule I- Current Income of
4 Individual Debtors (s) indicates that Debtors combined average monthly income is \$4,658.96 which
5 includes social security benefits (disability insurance benefits) of \$1,550.00 corresponding to Debtor
6 Luis Francisco Concepción and \$774.00 (\$337.00 per child) of auxiliary benefits that Debtors'
7 children receive on a monthly basis. Debtors' Schedule J- Current Expenditures of Individual
8 Debtor(s) lists average monthly expenses of \$4,258.96, which includes \$770.00 for school tuition,
9 \$200.00 for prorated expenses for school books, uniforms and materials and \$50.00 for school
10 lunches. Debtors Chapter 13 Plan (Docket No. 13) proposes to make 51 monthly payments of \$400.00
11 and 9 monthly payments of \$800.00 for a proposed base of \$27,600 over a sixty (60) month period.
12 Debtors' proposed plan is funded partially by Debtor's Luis Francisco Concepción's monthly
13 disability insurance benefits, which he receives under the Social Security Act.

14 On February 26, 2010 the Chapter 13 Trustee filed an objection to confirmation based on the
15 following arguments: (i) Debtors' education expenses for their two (2) children as listed in Schedule
16 J are unreasonable and excessive (combined annual tuition expense of \$10,140.00); (ii) Debtors'
17 education expenses for private schooling are much higher than the limits established under Section
18 707(b)(2)(A)(ii)(IV), namely \$1,650 per year per child to attend private school, for an above median
19 Chapter 13 debtor; (iii) Debtors' fail to provide evidence as to the reasonableness of the private
20 education expenses for their two (2) children and supporting documentation for Debtors' expenses
21 for books, materials, uniforms, etc.; (iv) the auxiliary benefits received by the two (2) minors from
22 the Social Security Administration should be used for the best interest and maintenance of all
23 expenses of the children, not just educational expenses; and (v) Debtors' fail to satisfy the
24 requirements of Sections 1325(a)(3), 1325(a)(6) and 1325(b)(1)(B), given that the same must propose
25 a feasible plan in which debtors make a good faith effort to repay the maximum amount of monies
26 to their creditors. (Docket No. 28).

27 In their reply to the Chapter 13 Trustee's objection to their plan, Debtors' present the
28 following arguments: (i) social security benefits are specifically excluded pursuant to Section

1 101(10A)(B) from debtor's current monthly income, as well as for calculating projected disposable
2 income for purposes of Section 1325(b)(1)(B), thus social security benefits received by debtor's
3 children must also be excluded; (ii) Debtor Luis Francisco Concepción in good faith has included the
4 totality of his social security benefits as part of his monthly income in order to make payments to
5 unsecured creditors under the plan; (iii) the social security benefits received by Debtors' children are
6 excluded from Debtors' disposable income and are used solely to fund their private education
7 expenses; (iv) Debtors' children educational expenses are reasonable since the school which the
8 children attend is not one of the most expensive schools in Puerto Rico; and (v) this Honorable Court
9 may take judicial notice that Puerto Rico's public school system is in dire decadence and the quality
10 of public education is very poor. (Docket No. 37).

11 *Applicable Law & Analysis*

12 A determination of the amounts that an above-median income Chapter 13 debtor must pay
13 unsecured creditors under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
14 Pub. L. No. 109-8, 119 Stat. 37 ("BAPCPA") has two basic components, income and expenses. Under
15 Section 1325(b)(1)(B)¹, if the trustee or an unsecured creditor objects to confirmation of the plan, the

16
17 ¹Section 1325(b) provides:

18 (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation
19 of the plan, then the court may not approve the plan unless, as of the effective date of the
20 plan—

21 (A) the value of the property to be distributed under the plan on account of such claim is not
22 less than the amount of such claim; or

23 (B) the plan provides that all of the debtor's projected disposable income to be received in
24 the applicable commitment period beginning on the date that the first payment is due under
25 the plan will be applied to make payments to unsecured creditors under the plan.

26 (2) For purposes of this subsection, the term "disposable income" means current monthly
27 income received by the debtor (other than child support payments, foster care payments,
28 or disability payments for a dependent child made in accordance with applicable
nonbankruptcy law to the extent reasonably necessary to be expended for such child) less
amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a
domestic support obligation, that first becomes payable after the date the petition is filed;
and

(ii) for charitable contributions (that meet the definition of 'charitable contribution' under

1 bankruptcy court may not confirm the plan unless the plan, “provides that all of the debtor’s projected
2 disposable income to be received in the applicable commitment period beginning on the date that the
3 first payment is due under the plan will be applied to make payments to unsecured creditors under the
4 plan.” 11 U.S.C. §1325(b)(1); See In re Padilla, 2009 Bankr. Lexis 2701 (Bankr. D.P.R. 2009). The
5 Debtors bear the burden of establishing that their proposed plan is confirmable. See In re McCarty,
6 376 B.R. 819, 821 (Bankr. N.D. Ohio 2007). The Bankruptcy Code does not define projected
7 disposable income. However, the Supreme Court, in Hamilton v. Lanning held that a bankruptcy court
8 must use the forward looking approach (rather than the mechanical approach) when calculating a
9 debtor’s “projected disposable income,” to account for changes in the debtor’s income and/or
10 expenses that are known or almost certain at the time of confirmation. Hamilton v. Lanning, 130 S.
11 Ct. 2464, 177 L. Ed. 2d 23 (U.S. 2010). However, debtor’s “projected disposable income” will be
12 limited to his disposable income if there are no changes in debtor’s income or expense that are known
13 or virtually certain at the time of confirmation. Id.

14 Disposable income for an above median debtor is defined as debtor’s current monthly income,
15 minus the amounts reasonably necessary to be expended as determined pursuant to Section
16 707(b)(2)(A) and (B). 11 U.S.C. 1325(b)(2) & (b)(3). Section 101(10A) defines current monthly
17

18 section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in
19 section 548(d)(4) in an amount not to exceed 15 percent of gross income of the debtor for
20 the year in which the contributions are made; and
21 (B) if the debtor is engaged in business, for the payment of expenditures necessary for the
continuation, preservation, and operation of such business.

22 (3) Amounts reasonably necessary to be expended under paragraph (2), other than
23 subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with
24 subparagraphs (A) and (B) of section 707(b)(2), if the debtor has a current monthly income,
when multiplied by 12, greater than—

25 (A) in the case of a debtor in a household of 1 person, the median family income of the
applicable State for 1 earner;

26 (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median
income of the applicable State for a family of the same number or fewer individuals; or

27 (C) in the case of a debtor in a household exceeding 4 individuals, the highest median
family income of the applicable State for a family of 4 or fewer individuals, plus \$575 per
28 month for each individual in excess of 4.” 11 U.S.C. §1325(b).

1 income as:

2 “... the average monthly income from all sources that the debtor receives (or in a joint case
3 the debtor and the debtor’s spouse receive) without regard to whether such income is taxable
income, derived during the 6-month period.” 11 U.S.C. §101(10A).

4 It must be noted that Section 101(10A)(B)² specifically excludes certain categories from current
5 monthly income, such as benefits received under the Social Security Act. See In re Thompson, —
6 B.R. —, 2010 WL 3583400 (B.A.P. 8th Cir. 2010). Moreover, the Eight Circuit in In re Carpenter,
7 recently ruled that the antiassignment provision of the Social Security Act, 42 U.S.C. §407³, operates
8 as a complete bar to the forced inclusion in the bankruptcy estate of past and future social security
9 proceeds. In re Carpenter, 614 F. 3d 930 (8th Cir. 2010); See also; In re Buren, 725 F. 2d 1080 (6th Cir.
10 1984)(The Sixth Circuit held that the Bankruptcy Reform Act of 1978, 11 U.S.C. §§1-1330, did not
11 repeal by implication the antiassignment provision of the Social Security Act of 1935, 42 U.S.C.
12 §407, that bars the assignment of benefits). However, Section 101(10A)(B) does not “...preclude
13 Debtors from voluntarily devoting a portion of that income to a chapter 13 plan or that prevents the
14 Court from considering that income in evaluating the feasibility of a plan proposed by Debtors.” In
15 re Schanuth, 342 B.R. 601, 605 (Bankr. W.D. Mo. 2006).

16
17 ² Section 101(10A)(B) provides:

18 includes any amount paid by any entity other than the debtor (or in a joint case the debtor
19 and the debtor’s spouse), on a regular basis for the household expenses of the debtor or
20 the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a
21 dependent), but excludes benefits received under the Social Security Act, payments to
22 victims of war crimes or crimes against humanity on account of their status as victims of
such crimes, and payments to victims of international terrorism (as defined in section
2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account
of their status as victims of such terrorism.” 11 U.S.C. §101(10A)(B).

23 ³42 U.S.C. §407 provides in part:

24 “(a) The right of any person to any future payment under this subchapter shall not be
25 transferable or assignable, at law or in equity, and none of the moneys paid or payable or
26 rights existing under this subchapter shall be subject to execution, levy, attachment,
garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

27 (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed
28 to limit, supersede, or otherwise modify the provisions of this section except to the extent
that it does so by express reference to this section.” 42 U.S.C. §407.

1 In order for a Chapter 13 plan to be confirmed, the same must be proposed in good faith. 11
2 U.S.C. §1325(a)(3). The term “good faith” is not statutorily defined. Good faith is determined on a
3 case by case basis employing the totality of the circumstances analysis to the facts of the case. See
4 In re Slade, 15 B.R. 910, 911 (9th Cir. B.A.P. 1981); In re Stitt, 403 B.R. 694, 703 (Bankr. D. Idaho
5 2008). The Sixth Circuit has held that bankruptcy courts should consider the following non-exclusive
6 factors as part of the totality of the circumstances analysis to determine whether a Chapter 13 plan
7 was proposed in good faith, namely: (1) the amount of the proposed payments and the amount of the
8 debtor’s surplus; (2) the debtor’s employment history, ability to earn, and likelihood of future increase
9 in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan’s statements
10 of the debts, expenses, and percentage repayment of unsecured debt and whether any inaccuracies are
11 an attempt to mislead the court; (5) the extent of a preferential treatment between classes of creditors;
12 (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and
13 whether any such debt is nondischargeable in Chapter 7; (8) the existence of special circumstances
14 such as inordinate medical expenses; (9) the frequency with which a debtor has sought relief under
15 the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13
16 relief; (11) the burden which the plan’s administration would place upon the trustee; and (12) whether
17 the debtor is attempting to abuse the spirit of the Bankruptcy Code. In re Caldwell, 895 F. 2d 1123,
18 1126-27 (6th Cir. 1990); Smyrnos v. Padilla (In re Padilla), 213 B.R. 349, 352 (B.A.P. 9th Cir. 1997).
19 In employing the totality of the circumstances analysis, “[t]he trick seems to be not placing too much
20 weight on any single factor, but in the court’s looking at how a number of factors in any given case
21 operate together to betray a plan proposed in bad faith.” In re McLaughlin, 217 B.R. 772, 775-76
22 (Bankr. W.D. Tex. 1998) (citing L. Clark & S. Lane, *Having Faith in Good Faith Analysis*, 683
23 PLI/Comm.) (669 Practising Law Institute 1994). This methodology is consonant with the purpose
24 of the good faith analysis which centers on whether the debtor filed his proposed plan with “honesty
25 of intention,” namely in conformity with the spirit and purpose of the law or for debt avoidance
26 purposes through manipulation of the Code. See In re Paley, 390 B.R. 53, 58 (Bankr. N.D. N.Y.
27 2008); In re Ochs, 283 B.R. 135, 137 (Bankr. E.D.N.Y. 2002).

28 In the instant case, the Chapter 13 trustee indicates that Debtors’ unreasonable educational

1 expenses hamper their good faith in proposing their plan, since they are not making an honest good
2 faith effort to repay the maximum amounts possible to their creditors. However, the trustee fails to
3 address the issue of statutory exclusion of benefits received under the Social Security Act as a
4 component of current monthly income pursuant to Section 101(10A)(B). Notwithstanding, Debtors'
5 exclusion from plan payments of the Social Security benefits received by their two (2) children does
6 not, by itself, contribute to a finding that the plan was proposed in bad faith pursuant to Section
7 1325(a)(3). See In re Thompson, —B.R.—, 2010 WL 3583400 (B.A.P. 8th Cir. 2010) (“It would be
8 inconsistent to say that the Debtors acted in bad faith simply by failing to devote to their plan money
9 that was never property of their estate in the first instance.”). At this juncture, this court concludes
10 that benefits received under the Social Security Act is not a component of disposable income under
11 Sections 101(10A) or 1325(b)(2), given that the same is statutorily excluded. However, this statutory
12 exclusion does not impede a debtor from contributing such monies to the plan for feasibility purposes.
13 Debtors’ proposed plan contemplates the inclusion of the monthly disability payments which amount
14 to \$1,550.00 which Debtor Luis Francisco Concepción receives under the Social Security Act. This
15 court holds that the Chapter 13 Trustee’s sole indication that Debtors are not contributing all of the
16 benefits received under the Social Security Act does not by itself warrant a finding of bad faith under
17 Section 1325(a)(3). However, Debtors must submit to the Chapter 13 Trustee evidence of the
18 prorated month expense of \$200.00 (\$2,400 yearly for two minors) for school books, materials,
19 uniforms listed as part of line item #17- Other on Schedule J-Current Expenditures Of Individual
20 Debtor(s) and provide documentary evidence to resolve the difference in tuition expense noted by the
21 Chapter 13 trustee, given Debtors list tuition expense of \$770.00 while the Chapter 13 Trustee notes
22 that at the meeting of creditors, the Debtors indicated that yearly tuition expense for their eldest son
23 amounted to \$5,490.00 and \$4,650.00 for their youngest son which amounts to \$845.00 monthly.
24 Lastly, this court declines to address the issue of adequacy of public instruction in Puerto Rico. This
25 court cannot take judicial notice of the same under Fed. R. Evid. 201(b), in spite of the fact that the
26 effectiveness and efficiency of the Puerto Rico Department of Education has recently been under
27 public scrutiny.

1 Conclusion

2 (1) The Chapter 13 trustee's objection to confirmation is hereby denied. (2) Debtors shall
3 provide the Chapter 13 trustee with the information mentioned above within fourteen (14) days. (3)
4 The hearing on confirmation is hereby scheduled for November 23, 2010 at 9:30 a.m.

5 SO ORDERED.

6 In San Juan, Puerto Rico, this 5th day of October 2010.

7
8 
9 Enrique S. Lamotte
10 United States Bankruptcy Court
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28